

2012 WL 12055340 (Ark.Cir.) (Trial Pleading)  
Circuit Court of Arkansas.  
Pulaski County

Victor SMITH,  
v.  
CHENAL HEALTH, LLC, et al.

No. CV2012002162.  
May 4, 2012.

### **Wrongful Death Complaint**

for plaintiff [Victor Smith](#), Administrator , [Willard Proctor, Jr.](#), Willard Proctor, Jr., P.A., 2100 Wolfe Street, Little Rock, AR 72202-6258, (501) 378-7720, Arkansas Bar No.: 87136, [willard@wprjrlaw.com](mailto:willard@wprjrlaw.com).

Plaintiffs, by their attorneys, THE LAW OFFICES OF WILLARD PROCTOR, JR., P.A., and for their Complaint, state:

### **PRELIMINARY STATEMENT**

1. This is an action for egregious injuries, damages, and wrongful death suffered by EDWARD SMITH due to the care and treatment, and lack thereof, while he was a nursing home resident of CHENAL HEALTH, LLC dba CHENAL HEIGHTS NURSING AND REHAB and in defendants' care. During this time, he suffered from dehydration, pressure sores, urosepsis, and death, among other maladies and indignities. This action arises under the common law of the state of Arkansas, the Arkansas Medical Negligence Act (Am. [Code Ann. §16-114-201 et seq.](#)), the Arkansas Long Term Care Resident Rights Act ([Ark. Code Ann. §20-10-1201 et seq.](#)), the Arkansas Omnibus Long Term Care Reform Act ([Ark. Code Ann. §20-10-1001 et seq.](#)), the Arkansas Staffing Requirements for Nursing Homes Act ([Ark. Code Ann. §20-10-1401 et seq.](#)), the Arkansas Neglect of An Endangered or Impaired Adult Act ([Ark. Code Ann. §§5-28-103\(c\)\(1\) and §16-118-107 et seq.](#)), the Arkansas Deceptive Trade Practices Act ([Ark. Code Ann. §§ 4-88-107 and 4-88-204 et seq.](#)), the Arkansas Survival of Actions Act ([Ark. Code Ann. § 16-62-101](#)), the Arkansas Wrongful Death Act ([Ark. Code Ann. § 16-62-102](#)), and other applicable laws for medical negligence, ordinary negligence, violation of nursing home resident rights, neglect of an endangered or impaired adult, deceptive trade practices, breach of fiduciary duty, and wrongful death by defendants. The amount in controversy exceeds, exclusive of interest and costs, the sum required for federal court jurisdiction in diversity of citizenship cases. Jurisdiction of this Court is invoked pursuant to Ark. Cont. Amendment 80 §6 and [Ark. Code Ann. §16-13-201](#) (Repl. 1999). Venue is proper pursuant to [Ark. Code Ann. §§ 16-60-112 and 16-55-213\(e\)](#).

### **PARTIES**

2. VICTOR SMITH is the personal representative of the ESTATE OF EDWARD SMITH, deceased as appointed by the Circuit Court of Pulaski County, Arkansas, Case No. 60PR-12-459, and brings this action individually, on behalf of the ESTATE OF EDWARD SMITH, and on behalf of the wrongful death beneficiaries of EDWARD SMITH. At all relevant times hereto, EDWARD SMITH was a resident of Pulaski County, Arkansas.

3. Defendant CHENAL HEALTH, LLC d/b/a CHENAL HEIGHTS NURSING AND REHAB (also referred to herein as "CHENAL HEIGHTS" or defendants unless otherwise specifically identified) is a for-profit limited liability company and nursing home organized and licensed in the state of Arkansas with its principal place of business in Pulaski County, Arkansas

that engages in the for-profit custodial care of **elderly**, helpless individuals who are chronically infirm, mentally and physically impaired, and in need of nursing home care and treatment. At all times material to this action, CHENAL HEIGHTS was the licensee of the nursing home facility of which EDWARD SMITH was a resident and operated and controlled it. This control included, but was not limited to, control of marketing, human resources, training, staffing, creation and implementation of all policy and procedures, federal and state Medicare and Medicaid reimbursement, quality of care assessment and compliance, licensure and certification, legal services, and financial, tax, and accounting control through fiscal policies established by CHENAL HEIGHTS. The training, expertise, sophistication, and experience of CHENAL HEALTH, LLC allowed it to be able to anticipate and know that the lack of proper financial resources for the sufficient supervision, staffing, and supplying of CHENAL HEIGHTS could result in injuries to EDWARD SMITH and other residents of CHENAL HEIGHTS.

4. Defendant CONVACARE MANAGEMENT, INC. is a for-profit corporation organized and licensed in the state of Arkansas with its principal place of business in Pulaski County, Arkansas that engages in the for-profit custodial care of **elderly**, helpless individuals who are chronically infirm, mentally and physically impaired, and in need of nursing home care and treatment. CONVACARE MANAGEMENT, INC. is the management company of CHENAL HEIGHTS and controlled the operation, planning, management, services, and quality control of CHENAL HEIGHTS while EDWARD SMITH was a resident. The authority exercised by CONVACARE MANAGEMENT, INC. over the nursing home facility included, but was not limited to, control of marketing, human resources management, training, staffing, services, creation and implementation of all policy and procedures used by the nursing home facility, federal and state Medicare and Medicaid reimbursement, quality care assessment and compliance, licensure and certification, legal services, and financial, tax, and accounting control through fiscal policies established by these defendants. Moreover, CONVACARE MANAGEMENT, INC. had intertwining directors, officers, members, agents, and high managerial personnel of CHENAL HEIGHTS, as well as members of the governing body of CHENAL HEIGHTS, that was legally responsible for establishing and implementing policies regarding the

management and operation of the nursing home facility that is the subject of this Complaint, and as such were responsible for the supervision of all aspects of the care of residents, finances to provide staff, supplies, and equipment for the care and well-being of the residents of CHENAL HEIGHTS and the policies and procedures developed to govern the care of the residents of CHENAL HEIGHTS making CONVACARE MANAGEMENT, INC. responsible for the liability described and complained of herein. The training, expertise, sophistication, and experience of CONVACARE MANAGEMENT, INC. allowed it to be able to anticipate and know that the lack of proper financial resources for the sufficient supervision, staffing, and supplying of CHENAL HEIGHTS could result in injuries to EDWARD SMITH and other residents of CHENAL HEIGHTS.

5. Defendant JOEY WIGGINS is a 100% owner of and director, officer, member, agent, and high managerial personnel of CHENAL HEALTH, LLC and CONVACARE MANAGEMENT, INC. and controlled the operation, planning management, services, and quality control of those entities while EDWARD SMITH was a resident of CHENAL HEIGHTS. The authority exercised by JOEY WIGGINS over the nursing home facility and its management company included, but was not limited to, direct control of marketing, human resources management, training, staffing, services, creation and implementation of all policy and procedures used by the nursing home facility, federal and state Medicare and Medicaid

reimbursement, quality care assessment and compliance, licensure and certification, legal services, and financial, tax, and accounting control through fiscal policies established by these defendants. Moreover, JOEY WIGGINS was a member of the governing body of CHENAL HEIGHTS, that was legally responsible for establishing and implementing policies regarding the management and operation of the nursing home facility that is the subject of this Complaint, and as such was responsible for the supervision of all aspects of the care of residents, finances to provide staff, supplies, and equipment for the care and well-being of the residents of CHENAL HEIGHTS and the policies and procedures developed to govern the care of the residents of CHENAL HEIGHTS making JOEY WIGGINS responsible for the liability described and complained of herein. The training, expertise, sophistication, and experience of JOEY WIGGINS allowed him to be able to anticipate and know that the lack of proper financial resources for the sufficient supervision, staffing, and supplying of CHENAL HEIGHTS could result in injuries to EDWARD SMITH and other residents of CHENAL HEIGHTS.

6. Defendants JOHN and JANE DOES A through Z are the currently unknown medical, nursing, and other healthcare providers and entities, insurers, and employees or agents of all said Defendants, entities, and individuals, charged with caring for and treating EDWARD SMITH at CHENAL HEIGHTS or owning, operating, controlling, insuring, or managing them on the relevant dates of admission set forth above. Plaintiff has attached hereto the affidavit of plaintiff's attorney attesting that the identities of JOHN and JANE DOES A through 2 are unknown pursuant to [Ark. Code Ann §16-56-125](#).

7. At all relevant times mentioned herein, defendants were subalterns, agents, and subsidiaries/affiliates of each other and owned, operated, and controlled the nursing home facility of which EDWARD SMITH was a resident, either directly, indirectly, or through the agency of each other and other diverse subalterns, agents, subsidiaries, contractors, employees, and JOHN and JANE DOES A through Z. Moreover, the actions of these defendants and each of their subalterns, agents, subsidiaries, contractors, employees and JOHN and JANE DOES A through Z are imputed to each defendant, jointly and severally, as each defendant's acts and omissions worked together with the acts and omissions of the other defendants as a proximate cause of the damages and injuries suffered by EDWARD SMITH. Furthermore, the training, expertise, and experience of the defendants allowed them to be able to anticipate and know that the lack of proper financial resources for the sufficient supervision, staffing, and supplying of their respective facilities would likely result in injuries to EDWARD SMITH. Finally, defendants have vicarious liability for the acts and omissions of all persons or entities under defendants' control either directly or indirectly including their employees, agents, consultants, medical directors, and independent contractors, whether in-house or outside entities, individuals, agencies, or pools causing or contributing to the injuries of EDWARD SMITH.

8. EDWARD SMITH was admitted to CHENAL HEIGHTS after his family could no longer care for him. Defendants actively sought residents with similar medical and nursing needs as EDWARD SMITH'S in order to fill their empty beds and increase their rate of occupancy and overall revenue. In fact, EDWARD SMITH was the kind of resident whose care, paid for by the government, defendants actively sought to fill their empty beds and to increase their rate of occupancy. Defendants were aware of EDWARD SMITH'S medical conditions and the care and treatment that he required when they represented they could adequately care for his needs. Notwithstanding this knowledge, defendants failed to provide for EDWARD SMITH'S needs and failed to provide sufficient staff, services, and supplies to meet his needs.

9. In an effort to assure that EDWARD SMITH and other residents whose care was funded by the government were placed at CHENAL HEIGHTS, defendants held themselves out to the Arkansas Department of Human Services and to the public at large as being:

- a. Skilled in the performance of medical, nursing, rehabilitative, and other services;
- b. Properly staffed, supervised, supplied, and equipped to meet the total needs of their residents;
- c. Able to specifically meet the total medical, nursing, rehabilitative, and other needs of their residents; and
- d. Licensed by the state of Arkansas and complying on a continual basis with all rules, regulations, and standards established for their facility.

10. Defendants failed to discharge their responsibilities to EDWARD SMITH with a reckless disregard and conscious indifference for his rights and safety causing him to suffer the injuries set forth herein. The severity of the recurrent negligence inflicted upon EDWARD SMITH by defendants accelerated the deterioration of his health and physical condition beyond that caused by the normal aging process or any underlying medical conditions and resulted in physical and emotional trauma including, without limitation, the following:

- a. Unintended weight loss;
- b. Urosepsis;

- c. Dehydration;
- d. Lying in his own feces and urine for medically unsafe periods of time;
- e. Other physical and emotional maladies; and
- f. Failure to prevent progression of wound deterioration.
- g. Death.

On all occasions complained of herein, EDWARD SMITH was under the care, supervision, and treatment of the agents and employees of the defendants and the injuries complained of herein were directly and proximately caused by the acts and omissions of the defendants.

## **CAUSES OF ACTION**

### **Medical Negligence**

- 11. Plaintiffs incorporate by reference herein and re-allege all of the above allegations.
- 12. Defendants deviated from the acceptable standard of medical and nursing care and did not apply the skill and learning the law required In the following respects:
  - a. Failure to provide the necessary care and services and sufficient staff to meet the total needs of EDWARD SMITH on a 24-hour, 7-day a week basis and attain or maintain his highest practicable physical, mental, and psychosocial well-being as determined by timely assessments and an individual plan of care;
  - b. Failure to provide adequate supervision and assistance to prevent the injuries set forth herein;
  - c. Failure to provide the necessary care and services to prevent infections;
  - d. Failure to provide the necessary care and services for sufficient fluid intake to maintain proper hydration and health;
  - e. Failure to provide the necessary care and services to maintain acceptable parameters of nutritional status;
  - f. Failure to provide the necessary care and services to maintain proper and timely personal hygiene and sanitary care;
  - g. Failure to protect and promote EDWARD SMITH'S right to a safe, clean, sanitary, and comfortable environment, to be free from **abuse** and neglect, and to a dignified existence
  - h. The failure to provide, implement, and assure and adequate, comprehensive, and accurate care plan based on the needs and functional capacity of EDWARD SMITH that met his physical, mental, and psychosocial needs as identified in a comprehensive assessment with revisions and modifications, as his needs changed;
  - i. The failure to provide care and treatment for EDWARD SMITH in accordance with his care plan and physician's orders;
  - j. The failure to maintain clinical records on EDWARD SMITH in accordance with accepted professional standards that are complete, accurate, timely, and organized;

k. The failure to adequately and appropriately monitor EDWARD SMITH and recognize significant changes in his condition and properly and timely notify and consult with his physician and family regarding those changes;

l. The failure to take reasonable steps to prevent, eliminate, and correct problems in EDWARD SMITH'S care;

m. The failure of the, governing body of the facility to discharge their legal and lawful obligations by assuring that professional standards of quality, facility policy and procedure, and the laws, regulations, and rules applicable to the facility were consistently complied with on an ongoing basis, that they remained up-to-date and modified as problems arose, and that appropriate corrective measures were implemented to correct problems concerning inadequate care;

n. The failure to use the degree of skill and care required of a nursing home when faced with the conditions of EDWARD SMITH;

o. Other failures as set forth In the deposition testimony taken in this action.

13. A reasonably prudent nursing home operating under the same or similar conditions, as well as one following the standards of care as set forth in the Arkansas Medical Negligence Act and AMI 1501 and 1504, would not have failed to provide the care listed above and would have foreseen that the failure to provide this care would result in devastating injuries to EDWARD SMITH Each of the foregoing acts of negligence on the part of defendants was a proximate cause of EDWARD SMITH'S injuries that were foreseeable to them.

#### **Ordinary Negligence**

14. Plaintiffs incorporate by reference herein and re-allege all of the above allegations.

15. Defendants owed a non-delegable duty to EDWARD SMITH and residents like his to hire, train, and supervise employees so that such employees deliver care and services in a safe and beneficial manner in order to assist them in attaining and maintaining their highest practicable level of physical, mental, and psychosocial well-being. Moreover, many of the acts and omissions Set forth herein involve basic custodial, rather than professional, care issues such as:

a. Supervising and monitoring staff;

b. Staffing with sufficient numbers;

c. Providing water;

d. Providing incontinent care and proper hygiene;

e. Calling the doctor and family with updates;

f. Requiring that policies and procedures be followed; and

g. Other care related to the simple activities of daily living.

h. Providing clinical pathways to mitigate progression of wound.

i. Nutritional standards to ensure weight stabilizations despite comorbidity.

16. Defendants were under a duty to exercise reasonable care and to render care and services as a reasonably prudent and similarly situated nursing home or hospital would render, but defendants breached their duty of care to EDWARD SMITH by failing to meet and abide by the standards set forth herein and this failure amounts to ordinary negligence.

17. A reasonably prudent nursing home operating under the same or similar conditions, as well as one following the standards of care, would not have failed to provide the care listed above and would have foreseen that the failure to provide this care would result in devastating injuries to EDWARD SMITH. Each of the foregoing acts of negligence on the part of defendants was a proximate cause of EDWARD SMITH'S Injuries that were foreseeable to the defendants.

Nursing Home Resident Rights Violations Against Separate Defendant

### CHENAL HEALTH, LLC

18. Plaintiffs incorporate by reference herein and re-allege all of the above allegations.

19. As the licensee of the CHENAL HEIGHTS nursing home facility, CHENAL HEALTH, LLC had a statutorily mandated, non-delegable responsibility to provide EDWARD SMITH with his nursing home resident rights as set forth in [Ark. Code Ann. §20-10-1201, et seq.](#)

20. Notwithstanding the responsibilities of CHENAL HEALTH, LLC to provide EDWARD SMITH with these statutorily mandated nursing home resident's rights, EDWARD SMITH was deprived of such rights by the following failures:

- a. The failure to provide adequate and appropriate healthcare, protective, and support services;
- b. The failure to provide adequate and appropriate therapeutic and rehabilitative services;
- c. The failure to provide adequate and appropriate supervision and protection;
- d. The failure to develop, implement, and update an adequate and appropriate resident care plan to meet the needs of EDWARD SMITH;
- e. The failure to maintain accurate medical and/or clinical records that contain sufficient information to justify the diagnosis and treatment and to accurately document the results, including, at a minimum, documented evidence of assessments and the needs of the resident, of an establishment of appropriate plans of care and treatment, and of the care and services provided;
- f. The failure to appropriately monitor EDWARD SMITH and recognize significant signs and symptoms of change in his health condition;
- g. The failure to properly supervise staff;
- h. The failure to properly train staff;
- i. The failure to provide sufficient staff and supplies to meet the needs of EDWARD SMITH;
- j. The failure to treat EDWARD SMITH courteously, fairly and with the fullest measure of dignity; and
- k. Otherwise violating EDWARD SMITH'S resident rights as set forth herein.

21. Pursuant to [Ark. Code Ann. § 20-10-1209\(a\)\(4\)](#), CHENAL HEALTH, LLC'S failure to do that which a reasonably careful nursing home would do under circumstances similar to those shown by the evidence in this case, which caused the serious injuries to EDWARD SMITH as described herein, entitles his to recover actual damages in an amount exceeding that required for federal court jurisdiction in diversity of citizenship cases and, Further, punitive damages for the willful, wanton, gross, flagrant, reckless and conducted with conscious indifference to the rights of EDWARD SMITH as provided by [Ark. Code Ann. § 20-10-1209\(c\)](#).

#### **Civil Liability For Conduct Constituting Felony Neglect Of An Endangered Or impaired Adult**

22. Plaintiffs incorporate by reference herein and re-allege all of the above allegations.

23. EDWARD SMITH was an endangered or impaired adult as defined by [Ark. Code Ann. § 5-28-101\(8\) \(B\)](#) and defendants were the caregivers for EDWARD SMITH as defined by [Ark. Code Ann. § 5-28-101\(3\)](#).

24. As set forth herein, defendants negligently failed to provide necessary treatment, rehabilitation, care, food, clothing, helter, supervision, and medical services to EDWARD SMITH and committed acts or omissions constituting felony conduct. In negligently failing to report health problems, changes in health problems, or changes in the health conditions of EDWARD SMITH to the appropriate medical personnel and otherwise negligently failed to carry out the lawfully required care plan or prescribed treatment plan for EDWARD SMITH Moreover, as set forth herein, defendants failed to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness as defined in regulations promulgated by the Office of Long Term Care of the Division of Medical Services of the Department of Health Human Services to an adult resident of a long-term care facility.

25. At the time of these occurrences, there was in force a penal statute, [Ark. Code Ann. § 5-28-103\(c\)\(1\)](#), by which the conduct set out herein constituted felony neglect of an endangered or impaired adult by causing serious physical injury. Pursuant to [Ark. Code Ann. § 16-118-107](#), any person injured or damaged by reason of conduct of another person that would constitute a felony under Arkansas law may file a civil action to recover damages based on the conduct and the remedy provided by [Ark. Code Ann. § 16-118-107](#) is in addition to any other remedies in law or equity.

26. By the heretofore described conduct, defendants caused the serious physical injuries to EDWARD SMITH as described herein and, aside from the compensatory damages prayed for this complaint, EDWARD SMITH is entitled to recover costs and attorney's fees pursuant to [Ark. Code Ann. § 16-118-107](#).

#### **Deceptive Trade Practices And illegal Actions Against An **Elderly** And Disabled Person.**

27. Plaintiffs incorporate by reference herein and re-allege all of the above allegations.

28. Defendants' conduct in this case constitutes deceptive and unconscionable trade practices and is unlawful and prohibited pursuant to [Ark Code Ann. § 4-88-107](#). This conduct includes:

- a. Knowingly making a false representation as to the characteristics, standard, or quality of goods or services;
- b. Knowingly taking advantage of a consumer who is reasonably unable to protect his or his interest because of a physical infirmity or a similar factor;
- c. Engaging in unconscionable, false, or deceptive practices in business, commerce, or trade; and
- d. Concealing, suppressing, or omitting material facts with the intent that others rely upon the concealment, suppression, or omission in connection with the sale or advertisement of goods or services.

29. Defendants' conduct in this case as set forth herein also constitutes an illegal action against an **elderly** and disabled person in that such conduct was in disregard of the rights of EDWARD SMITH in that defendants:

a. Knew their conduct was directed to an **elderly** and disabled person;

b. Knew EDWARD SMITH was more vulnerable because of age, poor health, infirmity, impaired understanding, restricted mobility, or disability;

c. Disregarded the standards, laws, and regulations set forth herein including, without limitation, [Ark. Code Ann. § 5-28-103 \(c\)\(1\)](#); 42 CFR f483, Arkansas Department of Human Service, Office of Long Term Care, Rules and Regulation for Nursing Homes; Ark. Code Ann. § 20-10-120; Ark. Code Ann. §20-10-100; and [Ark. Code Ann. 20-10-1401](#).

30. EDWARD SMITH suffered substantial physical, emotional, and economic damages and mental anguish resulting from the defendants' conduct, all constituting a violation and cause of action [Ark. Code Ann. § 4-88-204](#).

### **Breach of Fiduciary Duty**

31. Plaintiffs incorporate by reference herein and re-allege all of the above allegations.

32. At the time of the occurrences set forth herein, defendants were the caregivers, or owned, operated, managed, or controlled the caregivers, of EDWARD SMITH.

33. At the time of his admission into CHENAL HEIGHTS, EDWARD SMITH was **elderly**, frail, enfeebled, and incapacitated to the extent that he qualified for and needed to be placed in a nursing home for assistance with his health care needs, activities of daily living, and safety. Defendants were aware of this fact and his overall health condition at the time of his admission and agreed, for compensation, to provide for his care, needs, and safety.

34. By accepting EDWARD SMITH into their custody and care, for compensation, defendants created a special relationship with EDWARD SMITH and became fiduciaries with respect to his. As a consequence, defendants owed EDWARD SMITH the highest degree of honesty, loyalty, good faith, fair dealing, and care, and to provide for his care and safety as his condition reasonably required and to subvert their own interests in providing for these needs.

35. Defendants breached their fiduciary duty to EDWARD SMITH by their acts and omissions as set forth herein and, as a direct and proximate result, EDWARD SMITH suffered the atrocities, egregious Injuries, and damages as set forth herein.

### **Wrongful Death**

36. Plaintiffs incorporate by reference herein and re-allege all of the above allegations.

37. As a direct and proximate result of the previously alleged conduct, all of which was grossly negligent, willful and wanton, outrageous, reckless, malicious, and intentional, defendants caused the death of EDWARD SMITH.

38. EDWARD SMITH suffered personal injury including excruciating pain and suffering, mental anguish, fright, disfigurement, emotional distress, humiliation, loss of life, and death, all of which caused his family to suffer grief and mental anguish.

## DAMAGES

39. As a proximate result of the above conduct, plaintiffs are entitled to damages for medical expenses and costs, pain, suffering, mental anguish, grief, disability, trauma, loss of enjoyment of life, loss of quality of life and personal dignity, humiliation, fright, emotional distress, loss of life, funeral and related expenses, death, and other injuries as described herein, in an amount exceeding the minimum amount required for federal court jurisdiction in diversity of citizenship cases. Moreover, because defendants conduct was repeated and not a mistake and they were on notice of the matters set forth in this Complaint, and they knew or should have known, in light of the surrounding circumstances, that their conduct would naturally and probably result in injury, yet they still failed to discharge their responsibilities to EDWARD SMITH and continued their conduct in reckless disregard and with a conscious indifference for his rights and safety causing his to suffer the injuries set forth herein, defendants are liable for punitive damages in an amount exceeding the minimum amount required for federal court jurisdiction in diversity of citizenship cases and sufficient to punish defendants and deter defendants and others from similar conduct.

## CONSTITUTIONAL OBJECTIONS TO THE APPLICABILITY OF ACT 649 OF 2003 SPECIFICALLY RESERVED

40. In the 2003 Session of the Arkansas General Assembly, the Legislature passed an Act entitled The Civil Justice Reform Act of 2003 ("The Act"), which was signed by the Governor and became effective on or about March 25, 2003, and is codified presently at [Ark. Code Ann. § 16-55-201 et seq.](#) This is an action accruing after the effective date of the Act. The Act violates [Article 5, § 32 of the Arkansas State Constitution](#), which plainly prohibits legislative limitations on recoveries and Article 4, §§ 1 and 2 of that Constitution, which prohibit legislative incursions on judicial power. Additionally, the Act violates the constitutional scheme that formally worked to limit governmental incursion on common law rights and limited legislative power to assist special interests. This scheme is embodied in provisions in Article 2, §§ 4, 13, and 21, recognizing the right to petition the government for redress, Article 2, § 13, guaranteeing the right of every injured person to a remedy, Article 2, § 7, prescribing a right to a jury trial which shall remain inviolate;" Article 2, §§ 13 and 21, mandating due process and application of the law of the land; Article 2, §§ 3, 18, and 21, recognizing that all citizens shall receive equal treatment and the related Article 5, § 25, limiting unequal treatment to times when it is justified; requiring "that where a general law can be made applicable, no special law shall be enacted." Act 649 of 2003 was passed with

limited debate and without an evidentiary or other rational basis establishing that the ends. It sought to achieve would even be accomplished by the means of these many violations of these constitutional rights and provides various and sundry onerous and burdensome provisions, which include but are not limited to the requirement of specialty affidavits prior to Instituting suit, limitations on the amount of punitive damages, provisions creating "phantom defendants," the abrogation of traditional rights to plead joint and several liability, and joint and several liability, to name a few. Specifically, Section 15 of Act 649 and Section 19(a)(1)(b) of Act 649 bars introduction, in any case, of evidence of damages for the costs of necessary medical expenses unless those expenses were paid by or on behalf of the plaintiff or remain unpaid with the plaintiff or a third party liable for them. Therefore, Section 15 of Act 649 and Section 19(a) (1) (b) of Act 649 have the purpose of decreasing the amount of recovery in actions such as this for injury to the person. Further, Section 15 of Act 649 and Section 19(a) (1) (b) of Act 649 limit the evidence that a jury may consider. Section 15 of Act 649 and Section 19(a)(1)(b) of Act 649, therefore, impair the capacity of these plaintiffs in asserting claims for medical injury to exercise his right of access to the courts in violation of the right to petition the government for redress In Article II, Sections 4, 13, and 21 of the Arkansas Constitution. Furthermore,

Section 15 of Act 649 and Section 19(a)(1)(b) of Act 649 violate the right to remedy and due process clause of Article II, Sections 13 and 21, of the Arkansas Constitution because it has the effect of limiting these plaintiffs' access to justice. In addition, Section 15 of Act 649 and Section 19(a) (1) (b) of Act 649 violate Article V, Section 32, of the Arkansas Constitution. Section 15 of Act 649 and Section 19(a) (1) (b) of Act 649 also violate the separation of powers provision of the Arkansas Constitution, Article IV, Sections 1 and 2. Finally, Section 15 of Act 649 and Section 19(a) (1) (b) of Act 649 impermissibly diminish the role of jurors in violation of Article II, Section 7, of the Arkansas Constitution. Specifically, Section 18 of Act 649 is unconstitutional

in that it requires the plaintiffs to provide evidence of the standard of care allegedly breached by using an expert witness of the same medical specialty as the defendant. Ironically, Section 18 of Act 649 places no restriction, in the same circumstances on evidence the defendant might present regarding the standard of care. Further, Section 18 of Act 649 requires a plaintiff to establish causation through the use of a “qualified medical expert”. Section 18 of Act 649 places no restriction, in the same circumstances, on evidence a defendant might present regarding causation. Consequently, Section 18 of Act 649 treats victims of medical injury different than other victims of other torts and treats perpetrators of medical injury different

than it does perpetrators of other torts. As such, Section 18 of Act 649 treats victims of medical injury less advantageously than victims of other torts and treats perpetrators of medical injuries different than it does perpetrators of other torts. As such, Section 18 of Act 649 treats victims of medical injury less advantageously than victims of other torts and treats perpetrators of medical injury more advantageously than perpetrators of other torts. There is no rational basis for the difference in treatment worked by Section 18 of Act 549. There are no compelling state interests for the differences in treatment worked by Section 18 of Act 649. Section 18 of Act 649 has the purpose and Intent of reducing the amount of recovery for these plaintiffs in this cause of action. Section 18 of Act 649 is in direct conflict with [Arkansas Rule of Evidence 702](#). Section 18 of Act 649 violates the equality provisions and the right to a remedy and due process clauses of the Arkansas Constitution, Article II, Sections 3, 13, 18 and Section 18 of Act 649 impairs the capacity of these plaintiffs in asserting a claim for medical injury to exercise the right of access to the courts in violation of the right to petition the government for redress in Article II, Sections 4, 13, and 21, of the Arkansas Constitution. Section 18 of Act 649 violates Article V, Sections 25 and 32, of the Arkansas Constitution because the Legislature has created a special law that has the purpose and effect of limiting the plaintiff's right

to recovery. Section 18 of Act 649 violates the separation of powers doctrine in that it is in direct conflict with [Arkansas Rule of Evidence 702](#). Specifically, Act 649, Section 20, requires courts, at the request of a party, to order that awards for future damages greater than \$100,000.00 to be paid in future payments, rather than as a lump sum. Section 20 of Act 649 is unconstitutional because it legislatively mandates changes in awards made by juries. Act 649, Section 20 violates the right to a jury trial and due process clause of Article II, Sections 7, 13, and 21, of the Arkansas Constitution. Act 649, Section 20 impairs the capacity of the plaintiffs asserting claims for medical injury to exercise the right of access to courts in violation of the right to petition the government for redress in Article II, Sections 4, 13, and 21, of the Arkansas Constitution. Act 649, Section 20, violates the separation of powers provision in Article IV, Sections 1, and 2 and [Article 5, Section 32, of the Arkansas Constitution](#). As a consequence, the Act is unconstitutional and the fact that Plaintiffs have attempted to comply with some of its provisions in order to not delay the proceedings herein is not to be construed as a waiver thereof. In the event that it is alleged that the Plaintiffs have not complied with any provision of Act 649, or that Plaintiffs are bound by or this action is governed by any of its onerous constraints or provisions, the Plaintiffs pray for a declaratory judgment that the Act is itself

unconstitutional, in whole or in applicable parts, and be allowed a full and fair opportunity to brief and argue all pertinent issues.

### **REQUEST FOR JURY TRIAL**

41. Plaintiffs demand a trial by jury.

### **PRAYER FOR RELIEF**

THEREFORE, plaintiffs respectfully request the following relief:

A. A joint and several judgment against defendants for all general and special compensatory damages caused by the conduct of the defendants in an amount exceeding the minimum amount required for federal court jurisdiction in diversity of citizenship cases;

B. The cost of litigating this case as allowed by [Ark. R. Civ. P. 54](#) and other applicable laws;

C. Attorney fees pursuant to Ark. Code Ann. if 4-88-11307 and 448-201, [Ark. Code Ann. § 16-118-107](#), and other applicable laws including, inter alia, those cited herein;

D. A joint and several judgment against defendants for punitive damages in an amount necessary and sufficient to punish defendants and deter defendants and others from similar conduct in an amount exceeding the minimum amount required for federal court jurisdiction in diversity of citizenship cases;

E. A trial by jury

F. All other relief to which plaintiff is entitled or that the Court deems just and proper.

Respectfully submitted,

**VICTOR SMITH, ADMINISTRATOR PLAINTIFF**

/s/ Willard Proctor, Jr.

Willard Proctor, Jr.

Willard Proctor, Jr., P.A.

2100 Wolfe Street

Little Rock, AR 72202-6258

(501) 378-7720

Arkansas Bar No.: 87136

willard@wprjrlaw.com

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